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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 484.

UNITED STATES OF AMERICA,
Petitioner,

v.

THE COOPER CORPORATION, *et al.*,
Defendants-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR DEFENDANTS-RESPONDENTS.

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Introductory.

The United States District Court for the Southern District of New York entered judgment dismissing the complaint of the Government herein for failure to state a claim upon which relief can be granted. 31 F. Supp. 848 (R. 102-9).

The Circuit Court of Appeals for the Second Circuit (one judge dissenting) affirmed. 114 F. (2d) 413 (R. 115-9).

This Court granted a petition by the Government for a writ of certiorari—unopposed—which invoked the jurisdiction of this Court under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. 61 S. Ct. 141.

Statement.

The complaint of the Government herein dismissed sets forth certain allegations of fact, unproven and not here at issue, to the effect that a violation of the Sherman Anti-Trust Act has occurred.

The complaint concludes that by reason of such violation the United States possesses a right of suit under the Act.

The right of suit claimed for the United States in the complaint is not one of those rights of suit for fines, imprisonment, injunctions and forfeitures granted by the Sherman Act in express words to the United States. Instead it is a right of suit for treble damages granted by the Act in express words—not to the United States as in the case of the other rights of suit but instead—to persons. This right of suit admittedly has never before been claimed for the United States during the 50 years of the Act's existence.

Issue.

The sole issue presented is an issue of law, namely whether the United States possesses under the Sherman Act the right, never before asserted, of suit for treble damages.

Argument.

The Government by its novel complaint herein is inviting this Court—as it has unsuccessfully invited the District Court and the Circuit Court of Appeals—to undertake as a judicial function Congressional powers of legislation.

Bluntly to summarize its position, the Government believes that the United States needs the right of suit for treble damages nowhere granted to it by the Sherman Act. The Government therefore requests this Court, by this test case, to save Congress the amending of the Act by judicially engrafting thereon such right of suit.

Much of the argument advanced by the Government, in fact, is totally irrelevant to the legal issue of whether the United States does or does not possess under the Sherman Act the right of suit for treble damages. Instead it is directed towards establishing that the United States should be granted such right.

Of this irrelevant nature are the assertions of the Government that the United States in this particular case needs to recover damages illegally inflicted upon it—assertions premised upon the unproven allegations of the complaint herein. Such gratuitous assumption by the Government that there are no defenses to the charges made in the complaint may be ignored.

Likewise of this irrelevant nature are the declarations of the Government that the United States generally needs the right to sue for treble damages under the Sherman Act. With respect to these declarations of need the defendants-respondents submit that if the United States needs any general right to sue for damages under the Act it needs at most a right to sue for simple damages; no necessity exists for the United States to punish through threefold damages in addition to fines, imprisonment, injunctions and forfeitures. The defendants-respondents particularly deny that the United States needs the right to sue for treble damages in order to obtain desired prices on defense projects. The Government has in its possession weapons far more potent than treble damage suits to achieve that result —as *e.g.* its right to threaten and if need be to use the statu-

tory right of taking over the property of a vendor who refuses to sell at prices deemed by the Government to be reasonable. Section 9, Public Act 783, 76th Congress, approved September 16, 1940.

Incidentally, the defendants-respondents are unable to comment upon the Temporary National Economic Committee Monograph No. 19 on Government Purchasing, so copiously cited by the plaintiff, as copies of this Monograph have not as yet been printed for distribution to the public and the Government has failed to make the same a part of the record.

A portion of the argument advanced by the Government is directly related to the legal issue of whether the United States does in fact—rather than whether it should—possess under the Sherman Act the right of suit for treble damages. This argument is without merit. In refutation thereof the defendants-respondents specifically submit, with appropriate supporting authority, the following:

(1) The United States requires statutory authorization to sue for treble damages under the Sherman Act.

(2) The United States is nowhere granted statutory authorization to sue for treble damages under the Sherman Act.

(3) The United States was intentionally denied by Congress statutory authorization to sue for treble damages under the Sherman Act.

(4) The United States for 50 years has uniformly been viewed by the courts, the Department of Justice and Congress to lack statutory authorization to sue for treble damages under the Sherman Act.

I.

The United States requires statutory authorization to sue for treble damages under the Sherman Act.

The right of suit for treble damages under the Sherman Act is a statutory remedy unknown at common law, provided by the Act as part of a comprehensive plan creating statutory offenses and allocating among specified parties statutory remedies of suit. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 497-8; *D. R. Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 173-4.

These statutory remedies established by the Sherman Act are exclusive, with the result that no one—whether private individual or government—may claim a remedy under the Act unless such remedy is expressly created and allocated to the claimant by the Act. *Fleitmann* v. *Welsbach Street Lighting Company*, 240 U. S. 27, 28-9; *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, at 65 *et seq.*

Thus private individuals and state governments suing for equitable relief under the Sherman Act (prior to the enactment of the Clayton Act) have been held not entitled to such relief, because the statutory remedy of suing in equity under the Act was allocated exclusively to the United States. *Minnesota* v. *Northern Securities Co., supra; Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 471; *General Investment Co.* v. *Lake Shore & Michigan So. Ry. Co.*, 260 U. S. 261, 286.

As this Court emphasized in *Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590:

> "It is now the settled law that the remedies provided by the Anti-Trust Act of 1890 for enforcing the rights created by it are exclusive * * *" (p. 593).

And again, in the *Lake Shore case, supra:*

> "As respects the Sherman Anti-Trust Act as it stood before it was supplemented by the Clayton Act, this Court has heretofore determined that the civil remedies specially provided in the act for actual and threatened violations of its provisions were intended to be exclusive and that those remedies consisted only of
>
> (a) suits for injunctions brought by the United States in the public interest under §4 and
>
> (b) private actions to recover damages brought under §7. * * *
>
> The present suit for an injunction, brought by a private corporation in its own interest, was not within those remedies, and so could not be maintained under that act standing alone" (p. 286).

The United States accordingly may not claim the right of suit for treble damages under the Sherman Act unless such right is expressly created and allocated to the United States by the Act.

This conclusion in nowise conflicts with the alleged doctrine that the United States may have the benefit of rights granted by statute in general terms—thus not expressly to the United States. See *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239 and similar authority cited by the plaintiff. The United States may be entitled to rights granted by statute without restriction to all parties of whatever description; it is not, however, entitled automatically to rights created and restricted by statute specifically to named parties. *Davis* v. *Pringle,* 268 U. S. 315, 317-9; *United States* v. *Securities Corporation General,* 4 F. (2d) 619, 622 (App. D. C.), aff'd 269 U. S. 283. Otherwise, Congressional intent in carefully allocating specified rights to the parties named would be flouted.

II.

The United States is nowhere granted statutory authorization to sue for treble damages under the Sherman Act.

The right of suit for treble damages under the Sherman Act is created solely by Section 7 of the Act.

The United States consequently may exercise this new right of suit for treble damages—as the plaintiff conceded in its complaint and prior argument—only if Section 7 authorizes such suit.

Section 7 of the Sherman Act creates and allocates this right of suit for treble damages solely to any "person" as defined in the Act:

> "Sec. 7. Any *person* who shall be injured in *his* business or property by any other *person* or *corporation* by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by *him* sustained, and the costs of suit, including a reasonable attorney's fee" (July 2, 1890, Chap. 647, Sec. 7, 26 Stat. 210).*

The United States thus may exercise this new right of suit for treble damages—by authority of Section 7—only if the United States is any "person" as defined in the Act.

An examination of the Sherman Act reveals that any "person" as defined in the Act does not include the United States.

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* Italics ours throughout this brief.

(a) Normal Meaning of "Person".

The Act, by the mere use of the term any "person", does not automatically include the United States as a "person".

The term "person" as used in a statute is normally viewed (in the absence of specific expansion) to include merely natural individuals—and possibly corporations. *Bouvier's Law Dictionary* (1914), pages 2574-2575; *Black's Law Dictionary* (1933), pages 1355-1356. And, as early pointed out in *Levy* v. *McCartee*, 6 Pet. 102:

> "The legislature must be presumed to use words in their known and ordinary signification, unless that sense be repelled by the context" (p. 110).

The term "person" as used in a statute may occasionally be given the abnormal meaning of including the United States, when such abnormal meaning is clearly called for by "the connection in which the word [person] is found". *Ohio* v. *Helvering*, 292 U. S. 360, 370, cited by the plaintiff.

The term "person" as used in a statute such as the Sherman Act, however, granting substantive rights to and imposing burdensome liabilities upon any "person", is never held to have the abnormal meaning of including a sovereign such as the United States without clear statutory language directing such inclusion.

Recent Cases (1941), 54 Harv. L. Rev. 518:

> "Whether the word 'person' includes the United States depends on the context and purpose of the statute in which it is found. * * * but the United States is generally not so included" (p. 519).

Judge Chase, in the instant case:

> "Ordinarily the word person in a statute does not include the government.

* * * * * *

> "There is ample reason here, as there was in *Davis* v. *Pringle*, 268 U. S. 316, where the meaning of the word 'person' as used in Sec. 64 (a) (5) of the Bankruptcy Act was under consideration, for saying that if Congress had intended to include the government in Sec. 7 the 'ordinary dignities of speech would have led to the mention of the United States' " (114 F. (2d) 413, at 414).

In *United States* v. *Fox*, 52 N. Y. 530, aff'd 94 U. S. 315, it was expressly held that the United States was not a "person" within the meaning of a statute granting substantive property rights to "persons". Ruled the courts:

> "In construing a statute, words are to be taken in their ordinary sense, unless, from a consideration of the whole act, it appears that a different meaning was intended.
>
> "The word person does not, in its ordinary or legal signification, embrace a * * * government; * * *" (52 N. Y. 530, at 535).
>
> "The term 'person' as here used applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal Government. It would require an express definition to that effect to give it a sense thus extended. And the term 'corporation' in the statute applies only to such corporations as are created under the laws of the State" (94 U. S. 315, at 321).

(b) Sherman Act Use of "Person".

The Act, by its manner of using the term any "person", clearly indicates an intent not to embrace the United States within such term.

By Section 1 of the Act every "person" committing certain acts is subject to criminal suit for fines and im-

prisonment by the United States. To expand every "person" to mean any party who under any theory could be called a "person"—including the United States—would lead to the absurd result that the United States is considered to be subject to criminal suit by the United States. The Sherman Act is not so intended.

By Section 2 of the Act every "person" performing other acts is subject to criminal suit for fines and imprisonment by the United States. Again, to define every "person" as including the United States means that the United States is considered to be subject to criminal suit by the United States. Such definition is not intended.

By Section 3 every "person" once more is subject to criminal suit by the United States. The same reasoning applies.

By Sections 4 and 6 the United States is given remedies in addition to those of criminal suits against every "person"—*i.e.*, equitable and condemnation remedies. The same reasoning applies.

By Section 7 any "person" may bring suits for treble damages against any other "person" or "corporation". The Sherman Act was never intended to expand "person" or "corporation" to include the United States and thereby to permit the claim of private parties that they may sue the United States for treble damages.

The observation of Judge Chase in the instant case, with reference to Section 7, is most pertinent:

> "* * * if the federal government is included in the word 'person' as one who may sue civilly for damages it must be included in the phrase 'any other person or corporation' in the same section as one who may be sued; for there is absolutely nothing to indicate that Congress intended to use the same word twice in the same section without having its mean-

> ing the same in each instance. The argument in support of the government's position is not only novel but proves too much when it leads to the imposition of such a liability by indirection'' (114 F. (2d) 413, at 414).

Does the Government seriously contend that the United States—engaged as it is in a vast defense program involving price, production and other restraints minus the Congressional approval required in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225 *et seq.*—should be subject as a ''person'' to suit for treble damages?*

(c) Sherman Act Definition of "Person".

The Act indeed specifically defines the term any ''person'' in a manner to exclude from its meaning the United States.

''Person'' is expanded, by Section 8 of the Act, in clear terms which spell out in detail such abnormal meaning as is to be given to the word.

> ''SEC. 8. The word 'person', or 'persons', wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country'' (July 2, 1890, Chap. 647, Sec. 8, 26 Stat. 210; 15 U. S. Code, Sec. 7).

This statutory definition is clearly inapplicable to the United States.

It is argued that the statutory definition includes the United States, as the United States is a ''corporation''.

---

* In *United States* v. *Sherwood*, No. 500, this Term, the Government itself is arguing that the United States is not a ''person'' under a statute permitting a judgment creditor to bring an action, in the place of his judgment debtor, against a ''person'' indebted to the judgment debtor.

See *Dixon* v. *United States,* 1 Brock. 177, 7 Fed. Cas. 761 (Cir. Ct. Va.) and similar cases cited by the plaintiff. This argument has no merit, as the United States is not a corporation in the statutory sense. *Davis* v. *Pringle,* 268 U. S. 315, 317-19; *cf. Georgia* v. *Adkins,* 10 Fed. Cas. 241, 242-3 (C. C. N. D. Ga.).

In the latter case the court, in ruling that a sovereign state was not a "corporation" within the meaning of the statute there involved, stated:

> "I am of the opinion that congress intended the term 'corporation,' as used in this act, to be understood in its general, obvious, and natural meaning; and, therefore, it does not include the term 'state.' And so far as my limited researches go, I am unable to discover a single case in the supreme court, or in any of the circuit or district courts of the United States, wherein it has been decided that the term 'corporation'—body corporate or politic—when used in a statute, includes a 'state', or where the one term is used as a synonym for the other" (pp. 242-243).

Indeed, if the United States were to be considered a "corporation", the statutory language of Section 8 demonstrates a clear intent to exclude the type of corporation represented by the United States. As noted previously, Section 7 permits treble damage actions to be brought against any "person or corporation"—thereby carefully declaring that "person" is not the same as "corporation". Section 8 then specifically defines "person" to include only a limited type of "corporation", namely "corporations * * * existing under or authorized by the laws of" some sovereign entity. "Person" includes only the creatures existing "under" or authorized "by" the United States—not the United States itself.

Assuming that the United States might loosely be termed a corporation existing under or authorized by the Constitution—which is part of the "supreme law of the land" *McCulloch* v. *Maryland*, 4 Wheat 316, and *Ex Parte Siebold*, 100 U. S. 371, cited by the plaintiff—the United States still cannot properly be termed a corporation existing under or authorized by the "laws of the United States." For the Constitution is not one of the "laws of the United States." The Constitution and Congressional statutes repeatedly recognize the distinction between the Constitution and the "laws of the United States," as shown by the following:

Constitution, Article III:

"SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the *Laws of the United States*, and Treaties made, or which shall be made, under their Authority * * *"

Constitution, Article VI:

"This Constitution, and the *Laws of the United States* which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land * * *"

28 U. S. C. A., Section 41:

"The district courts shall have original jurisdiction as follows:

"(1) * * * where the matter * * * arises under the Constitution or *Laws of the United States* * * *."

28 U. S. C. A., Section 71:

"Any suit * * * arising under the Constitution or *laws of the United States* * * *, may be removed * * *"

To refer to judicial authority interpreting the phrase "laws of the United States":

Railroad Co. v. *Mississippi*, 102 U. S. 135:

> "* * * a case in law or equity * * * may, properly, be said to arise under the Constitution or a *law of the United States*, whenever its correct decision depends on the construction of either;
>
> "* * * cases arising under the *laws of the United States* are such as grow out of the legislation of Congress * * *" (p. 141).

Tennessee v. *Davis*, 100 U. S. 257:

> "Cases arising under the *laws of the United States* are such as grow out of the legislation of Congress, * * *" (p. 264).

Beck v. *Johnson*, 169 Fed. 154 (C. C. W. D. Ky.):

> "Concerning rules and regulations made by executive officers under the authority of Congress, after careful consideration we have concluded that all of them * * * are not themselves '*laws of the United States*' within the meaning of that phrase in the removal act. In other words, we think that when Congress used that phrase it meant acts of Congress * * *" (p. 162).

In short, a corporation existing under or organized by the laws of the United States is a corporation existing under or authorized by the Acts of Congress. Cf. *Pacific Railroad Removal Cases*, 115 U. S. 1.

It should be emphasized that there is nothing odd in the alleged fact that federal corporations—existing under and authorized by the "laws of the United States" and therefore expressly defined in Section 8 of the Sherman Act to be a "person"—may have rights of suit under the Sherman

Act which the United States as such lacks. Congress purposely creates each of these federal corporations to act in a manner distinct from—to exercise powers denied to—the traditional departments of the United States. As stated in *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381:

> "Because of the advantages enjoyed by the corporate device compared with conventional executive agencies, the exigencies of war and the enlarged scope of government in economic affairs have greatly extended the use of independent corporate facilities for governmental ends" (p. 390).

Accord: *United States ex rel. Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, 8.

There is a very real distinction between the United States and the corporations existing under and authorized by its laws.

United States v. *Strang*, 254 U. S. 491, in referring to a federal corporation, stated:

> "Notwithstanding all its stock was owned by the United States it must be regarded as a separate entity" (p. 493).

Sloan Shipyards Corp. v. *United States Shipping Board Emergency Fleet Corp.*, 258 U. S. 549, pointed out with respect to the incorporation of a federal corporation that:

> "The meaning of incorporation is that you have a person, and as a person one that presumably is subject to the general rules of law" (p. 567).

later stating that a contract entered into by the federal corporation demonstrated that:

> "The distinction between it and the United States is marked * * *" (p. 569).

(d) *Davis* v. *Pringle.*

The situation here involved is analogous to that of *Davis* v. *Pringle,* 1 F. (2d) 860 (C. C. A. 4th), aff'd 268 U. S. 315, wherein it was held that the United States could not as any "person" claim priority under the Bankruptcy Act.

The Sherman Act, creating and allocating rights of action, first deals with the status of the Federal Government and subsequently with that of private persons. The Act expressly grants to the United States rights to sue for fines, imprisonment, injunctions and forfeitures, and then grants to any "person" the right to sue for treble damages.

In similar fashion the Bankruptcy Act of the *Pringle* case, creating and allocating rights of priority, first expressly dealt with the status of the Federal Government and subsequently with that of private parties. This Act initially gave a right of priority to tax claims of the United States and then gave another right of priority to claims of any "person". As summarized in the *Pringle* case:

> "The statute provides the following order of priority:
>
> "(a) The court shall order the trustee to pay all taxes legally due to the United States * * * in advance of the payment of dividends to creditors.
>
> (b) Debts to have priority, except as herein provided, and to be paid in full, and the order of payment shall be: '* * * (5) debts owing to any person who by the laws of the states or the United States is entitled to priority' " (1 F. (2d) 860, at 862).

The Sherman Act provides an expansion of the term any "person" which includes a type of "corporation" but fails to include the United States.

The Bankruptcy Act provided a somewhat similar expansion. As stated in the *Pringle* case:

> "The statute * * * gives this definition: '(19) "Persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations.' " (1 F. (2d) 860, at 863).

The Circuit Court of Appeals in the *Pringle* case held that the Bankruptcy Act authorized the United States to claim priority only as the "United States"—i.e., with respect to taxes—and not as any "person" or "corporation".

The reasoning of the Circuit Court of Appeals, as applied to the instant case, necessitates the conclusion that the Sherman Act authorizes the United States to claim rights of action only as the "United States"—i.e., with respect to suits for fines, imprisonment, injunctions and forfeitures—and not as any "person" or "corporation". The reasoning of the Court was as follows:

> "It is argued, * * * that priority is given the United States * * * by Section 64b (5), being Comp. St. Sec. 9648: 'Debts owing to any person who by the laws of the states or the United States is entitled to priority.' This grade of priority is not given to the United States * * * unless the United States falls under the designation of 'any person'. The statute itself gives this definition: '(19) "Persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents,

officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations.' Section 1, cl. (19), Bankruptcy Act of 1898 (Comp. St. Sec. 9585 (19)).

"The failure to include the United States and the states in the definition could not have been inadvertent. *The United States and the several states of the Union are not persons, and are not commonly thought of as persons,* and if it had been intended that 'persons' should have such a comprehensive and unusual meaning as to include them, the framers of the definition would have said so.

"Again, when the Congress had already dealt with claims of the United States under the name of the United States, and had deliberately limited its priority to taxes, it is hardly reasonable to attribute to the Congress an intention to deal again with the claims of the United States and include them in a provision relating to debts of 'any person' " (1 F. (2d) 860, at 862-3).

This Court affirmed the holding below in language expressly approving of the logic used by the lower court, despite a vigorous contention by the Government in its brief that—under *Dixon* v. *United States,* 1 Brock. 177, 7 Fed. Cas. 761 (Cir. Ct. Va.) and other cases now cited on the very same point by the present plaintiff—the United States was at least a "corporation". Said this Court:

"It may be assumed that the priority must be found if at all in the Bankruptcy Act * * * and the provisions as to priority in §64 with which we are principally concerned. By 'a' of that section 'The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States * * * in advance of the payment of dividends to creditors.' This taken by itself would seem to exclude other

debts. But the section goes on in 'b' to give priority in the order named to '(5) debts owing to any person who by the laws of the States or the United States is entitled to priority,' and the Government argues that by §1 (19) 'persons' shall include corporations and that the United States is a corporation and therefore within these words. Being within them, it is said, it is entitled to priority by a law of the United States, the well known Rev. Stat. Section 3466. It is said that no other person except the United States itself can be discovered who is given the right by its laws.

"We attach little value to this logical concatenation as against the direct effect of §64, taken according to the normal usages of speech. It is incredible that after the conspicuous mention of the United States in the first place at the beginning of the section and the grant of a limited priority, Congress should have intended to smuggle in a general preference by muffled words at the end. The States are mentioned in (5) before the United States, showing that their laws were primarily in mind. The United States seems added to avoid some possibly overlooked case.' *The ordinary dignities of speech would have led to the mention of the United States at the beginning of the clause, if within its purview. Elsewhere in cases of possible doubt when the Act means the United States it says the United States.* We are of opinion that to extend the definition of 'person' here to the United States would be 'inconsistent with the context' * * *" (268 U. S. 315, at 317-318).

Accord: *United States* v. *Securities Corporation General*, 4 F. (2d) 619, 622 (App. D. C.), aff'd 269 U. S. 283; *Abeken* v. *United States*, 26 F. Supp. 170, 172 (E. D. Mo.); *District of Columbia* v. *American Oil Co.*, 39 F. (2d) 510, 512 (App. D. C.).

(e) Government Citations.

The Sherman Act repeatedly denies to the United States the right of suit for treble damages: First, through excluding the right of suit for treble damages from those rights of suit expressly granted to the United States; second, through granting the right of suit for treble damages expressly to a "person" who normally is not considered to be the United States; third, through making it impossible for a "person" to be the United States by designating this "person" as (unlike the United States) one who not only sues but also is sued; and fourth, through defining this "person", entitled to sue, as including merely corporate creatures of the United States and not the United States itself.

The Government has failed to cite a single authority sanctioning the construction by the courts of the Sherman Act otherwise than as thus written.

The United States may, of course, exercise without statutory authority those rights granted by the common law to all property owners—not restricted to any "person". See *Cotton* v. *United States*, 11 How. 229, *Dugan* v. *United States*, 3 Wheat. 172, and *United States* v. *Gear*, 3 How. 120, cited by the plaintiff.

The property and activities of the United States, moreover, may in certain instances be referred to in statutes referring loosely to the property and activities of persons. See dicta in *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, and similar cases cited by the plaintiff.* In *Stanley* v. *Schwalby*, 147 U. S. 508, a procedural statute of limi-

* *Ohio* v. *Helvering*, 292 U. S. 360 (state engaged in the liquor business a taxable "person"); *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84 (United States a "resident"); *Nardone* v. *United States*, 302 U. S. 379 (federal agents "persons" forbidden to tap wires).

tations referring to actions against any person was stated to refer as well to actions against the United States.

These authorities, however, scarcely bear upon the question at issue.

A statute granting new substantive rights to the United States, and additional substantive rights to any "person," is given the abnormal meaning of including the United States within the term any "person" only when Congress by express definition has given to the term this abnormal meaning. Cf. *Lincoln* v. *Ricketts*, 297 U. S. 373, 376-7, and the English statutes cited by the plaintiff on page 15 of its brief. There is no such definition in the Sherman Act. In the present case the plaintiff desires this Court to exercise the legislative function of supplying such definition to the Sherman Act.*

III.

The United States was intentionally denied by Congress statutory authorization to sue for treble damages under the Sherman Act.

Not only does the Sherman Act fail to authorize the United States to sue for treble damages, but the Congressional debates on the Act indicate that such authorization was deliberately withheld.

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* Of little value are the miscellaneous state cases cited by the plaintiff as to whether states, counties, etc. might at times be considered to be "persons". The Government failed to point out that these state cases on subordinate political subdivisions are in utter confusion—that many authoritative cases are available which arrive at conclusions directly opposed to those set forth by the Government. Certain of these cases not cited by the Government include *Banton* v. *Griswold*, 95 Me. 445, 448 (state or government not a person); *Malone* v. *Peay*, 159 Tenn. 321, 326 (state not a person); *Onondaga County Savings Bank* v. *Love*, 166 Misc. 697, 701 (state or government not a person); *Osterhoudt* v. *Stade*, 133 App. Div. 83, 85 (state neither a person nor a corporation).

(a) General Debates on Sherman Act.

The debates on the Sherman Act generally disclose a complete scheme of supplementary remedies, each for its own purpose.

On the one hand, Section 7 was intended by its provisions authorizing any "person" to sue for treble damages to protect the individual competitor whom a "monopoly" might attempt to destroy, and to protect weak individual buyers against the oppressive power of a "combination." Treble instead of remedial damages were realized to be an extreme remedy—contrary to usual concepts of Anglo-Saxon law. Such remedy was to be granted to the private party who was thought to need a gambling possibility of profit in the form of threefold the actual damages to encourage him to face the risk and expense of such a suit. (The Federal Government, with all the resources of the country at its disposal and with other weapons of suit, needed no such gambling incentive of threefold recovery.)

On the other hand, the theory of governmental enforcement of the Sherman Act was that the United States should have power to proceed against violations of the statute by injunction—as a preventive measure—and by punitive proceedings for fines, imprisonment and forfeitures in such cases as might warrant action of that nature. These powers were deemed adequate. There is nothing in the Act or in the debates to indicate an intent that the United States was to bring suits for treble damages—and this is borne out by the fact that the United States has never before done so throughout the 50 years since the statute was enacted. Indeed had the Act's framers intended such suits for damages they would, at most, have permitted the United States to recover actual damages. The United States was adequately supplied with weapons of punishment and would be entitled

at best to remunerative, rather than with three-fold punitive, damages.

To borrow the analysis of the Sherman Act as set forth by this Court in *D. R. Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165 and quoted by the plaintiff:

> "* * * founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent
>
> not the mere injury to an individual which would arise from the doing of the prohibited acts,
>
> but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented,
>
> and hence not only the prohibitions of the statute but the remedies which it provided were co-extensive with such conceptions" (p. 174).

(b) Views of Senators Sherman and Hoar.

Reference to explanatory statements by the sponsors and drafters of the Sherman Act give definite corroborative evidence that statutory authorization to bring treble damage actions was intentionally withheld from the United States. Needless to say such statements are here relevant. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 474-5. *United States* v. *Great Northern Railway Co.*, 287 U. S. 144, 154-5; *Wright* v. *Vinton Branch*, 300 U. S. 440, 463-4; *Hassett* v. *Welch*, 303 U. S. 303, 307-10.

Senator Sherman, when he reintroduced his Bill on March 18, 1890, provided in Section 1 that the United States should be entitled to bring various civil actions and in Section 2 that any "person" should be entitled to sue any "person" or "corporation" for double damages.

Section 1 (*in part*):

> "* * * And the circuit court of the United States shall have original jurisdiction of all suits of a civil nature at common law or in equity arising under this section, and to issue all remedial process, orders, or writs proper and necessary to enforce its provisions. And the Attorney-General and the several district attorneys are hereby directed, in the name of the United States, to commence and prosecute all such cases to final judgment and execution."

Section 2:

> "That any person or corporation injured or damnified by such arrangement, contract, agreement, trust, or combination defined in the first section of this Act may sue for and recover, in any court of the United States of competent jurisdiction, without respect to the amount involved, of any person or corporation a party to a combination described in the first section of this Act, twice the amount of damages sustained and the costs of the suit, together with a reasonable attorney's fee."

This Bill was fully discussed by Senator Sherman and by Senator Hoar, among others. In the discussion it was pointed out that under Section 1 the United States was entitled to bring various civil actions including those for simple damages and for equitable relief, and that under Section 2 private parties were entitled to sue for double damages. It was expressly stated by Senator Sherman—and agreed to by Senator Hoar—that Section 2 in giving to any "person" the right to sue for double damages gave such right only to private parties and not to the United States.

> "*Mr. Sherman:* * * * If the Senator from Massachusetts will read the second section of the bill he will find that that alone deals with private suits.
>
> * * * * * *

"It is *the second section* that gives the civil suit, and that *is not to be prosecuted at all by the United States or by the officers of the United States.* The first section deals with the public injury to the people of the United States and there the suit is brought in the name of the United States to restrain, limit, and control such arrangements so far as they are illegal. *The second section gives a private remedy to every person injured.* It seems to me the two sections are as distinct from each other as possible.

"*Mr. Hoar:* The Senator from Ohio states, in my very humble judgment, two entirely different and conflicting and inconsistent propositions. I agree and thoroughly understand that *the second section of the bill gives individuals the right to private suits.* I leave that out as settled. I am looking at the first section alone. The Senator says that the first section provides nothing but suits for public offenses, which are criminal suits and to be tried in the name of the United States, as for an offense against the United States. The language of the section is:

"And the circuit court of the United States shall have original jurisdiction of all suits of a civil nature at common law or in equity arising under this section.

"I should like to ask the Senator again, does he understand that the United States is to enforce this proposed statute by a civil suit, and not by a criminal proceeding?

"*Mr. Sherman:* I say that in a civil suit brought in the name of the United States the United States may sue on a contract; they may sue for a neglect; they may sue for a great many things. Those are civil suits. The distinction between a civil suit and a criminal suit, I need not tell the Senator from Massachusetts.

"*Mr. Hoar:* I understand that. What will be the judgment?

"*Mr. Sherman:* It may be a judgment of ouster of the corporation; it may be a judgment for dam-

ages. Civil suits and criminal suits are easily distinguished.

"*Mr. Hoar:* There is no difficulty in that.

"*Mr. Sherman:* Very well. This is a civil proceeding commenced by the people of the United States against these corporations, and a judgment may be, as in ordinary cases, an ouster of the power of a corporation; it may be for damages; there may be an injunction; there may be proceedings in *quo warranto,* and so of the other ordinary civil proceedings which are fixed by the judiciary act of the United States.

"But *the second section provides purely a personal remedy, a civil suit also by citizens of the United States*" (21 Cong. Rec. 2563-2564).

The March 18, 1890 Sherman Bill was later supplemented, by amendment, with additional sections providing for penalties of fines and imprisonment. See the March 25, 1890 Sherman Bill. Senator Hoar thereupon objected to a further amendment providing for additional penalties, saying:

> "The injury to the United States or to anybody else in the way of property or business or any other material necessity is satisfied in another way."

referring in the same breath to

> "* * * the sum which is to be recovered by the United States if it has suffered in any of its properties or functions which would make it a suitor for it to assert its own rights * * *" (21 Cong. Rec. 2641).

Senator Hoar, in other words, believed that any injury to the United States was sufficiently satisfied under Section 1 of the Sherman Bill (providing the United States with various civil remedies including the right to sue for dam-

ages), and also under the March 25, 1890 supplemental sections (providing for fines and imprisonment).

The Senator could not have been referring to injury being satisfied under Section 2 of the Bill (permitting suits for double damages), because Senator Hoar had accepted Senator Sherman's explanation of Section 2 as relating to individuals and private suits and "not to be prosecuted at all by the United States." To this Senator Hoar had stated:

"I leave that out as settled."

Senator Hoar—as plaintiff pointed out below—eventually rewrote most of the Sherman Bill. In his revision the Senator cut out completely Section 1 of the Sherman Bill (with its provisions for civil suits by the United States, including the right to sue for damages). The Senator set forth instead, in Sections 1, 2, 3, 4 and 6 of his revision, clearly delineated remedies of criminal, equitable and condemnation proceedings brought by the United States. In his revision, however, the Senator kept almost intact Section 2 of the Sherman Bill (raising the double damages therein provided to treble damages and renumbering it Section 7).

This Hoar version of the Sherman Bill—lacking the original Section 1 Government suit for damages, but retaining the original Section 2 private suit for damages described as not to be brought by the Government—was enacted into law as the Sherman Act.

It is interesting to speculate why Senator Hoar deleted the original Section 1 thought to give to the United States the right to sue for damages. Apparently he had come to the conclusion that the United States did not need this right. He had expressed himself as dubious that the United States could successfully prove in court that it had suffered damages (21 Cong. Rec. 2567).

Obviously Senator Hoar was justified in believing that the United States did not need the right to sue for damages. The United States is given by the Sherman Act sweeping rights of suit. It may thereby protect itself fully from injury—for it may not only punish violations of the Act but may put an end to such violations at their very inception.*

Certainly if Senator Hoar had thought that the United States did need the right to sue for damages, he would at most have retained the original Section 1 permitting suits by the United States for simple damages. He had opposed the addition of penalties other than as provided finally in his revision of the Bill—and consequently would have objected to the granting to the United States of the right to punish not only through fines, imprisonment, injunctions and forfeitures but also through three times any possible damages.

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* The very allegations of the plaintiff in the complaint herein—biased though they be—demonstrate the lack of need of the United States for the right to sue for damages. According to the complaint the Procurement Division of the Government (in the face of a business boom and the rising prices of 1936 and early 1937, of which this Court may take judicial notice, *Dayton Power & Light Co.* v. *Public Utilities Comm.*, 292 U. S. 290, 311; *Michigan Bell Telephone Co.* v. *Odell*, 45 F. (2d) 180, 185 (E. D. Mich.)) purchased tires repeatedly from the defendants on the basis of bids submitting uniform prices. The Division was apparently satisfied with the lowness of the prices bid, and seemingly recognized that the uniformity among bids might as readily result from innocent factors such as price lists as from illegal factors, for the Division not only accepted the bids but asked for more. Subsequently, according to the complaint, the Procurement Division objected to further bids submitting uniform prices (in the middle of 1937 when business conditions had turned for the worse) and merely by

(1) refusing to buy tires from the defendants on a uniform bid basis—instead buying from another source—

(2) plus notifying the defendants that uniform bids were deemed to be *prima facie* illegal under the criminal and equitable provisions of the Sherman Act

broke the Federal Government tire market and obtained the tire prices it then desired.

(c) Particular Sections of the Sherman Act.

The particular sections of the Sherman Act, drafted by Senators Sherman and Hoar, fully accord with their intent to deny to the United States the right of suit for treble damages.

For example, as stated above, in Section 8 of the Sherman Act any "person" entitled to sue for treble damages is expanded to include specified corporations and associations, without including the United States. In view of the well recognized usage referred to in II (a), *supra* and the express holding of *United States* v. *Fox,* 94 U. S. 315 (the most recent Supreme Court case on the point)—to the effect that the word "person" unenlarged means a natural individual—Congress would have expressly included the United States within the definition of any "person" had it intended the United States to be a "person" entitled to sue for treble damages. The doctrine of *expressio unius est exclusio alterius* clearly applies and should be decisive.

In federal statutes where it is intended that the United States shall fall within the category of "person", the definition thereof specifically includes governments. One example is the Securities Act of 1933, where the word "person" is defined to include "a government or political subdivision thereof." Other examples include the Civil Aeronautics Act of 1938, Section 1 (27), which defines "person" to include any "body politic"; and Section 13 (1) of the Interstate Commerce Act, which provides for complaints to the Interstate Commerce Commission by any person, etc., "or any body politic or municipal organization." Compare also the English practice, referred to on page 15 of the Government's brief.

To refer to another section of the Sherman Act, Section 7, in giving any "person" the right to sue for treble dam-

ages, provides for additional recovery of "a reasonable attorney's fee." This provision for a professional fee is clearly inapplicable to the Federal Government and affords further indication that the Section was not intended to give rights to the United States.

(d) Proposed Amendment to Sherman Act.

It is pointedly significant that in 1900 the House of Representatives, when attempting to establish a new right of suit under the Sherman Act, provided that the new right was to be exercised

> "* * * at the suit of any person or persons, or corporation or association, or by and in behalf of the United States * * *."

See §9 of H. R. 10539, 56th Cong., 1st Sess., which was passed by the House but failed to become law.

IV.

The United States for 50 years has uniformly been viewed by the Courts, the Department of Justice and Congress to lack statutory authorization to sue for treble damages under the Sherman Act.

For 50 years it has been an accepted and uniformly repeated interpretation of the Sherman Act that the United States was exclusively to exercise the criminal and preventative rights of suit contained in Sections 1-6 while private individuals and corporations were exclusively to exercise the right of treble damage suit contained in Section 7.

(a) The Courts.

The lower courts, when first presented with the problem of interpreting the then newly enacted Sherman Act, consistently took this position.

Pidcock v. *Harrington*, 64 Fed. 821 (C. C., S. D. N. Y.):

> "* * * a *private* person is given (section 7) the right to maintain an action at law; * * * The first three sections are penal statutes. They give no civil remedy. Section 4 vests the right to institute proceedings in equity in the district attorneys of the United States, and, together with section 5, prescribed the procedure in such suits. Section 6 provides for the seizure and forfeiture to the United States of property illegally owned under the provisions of the act. So far, then, the act is a public act providing no private remedy. * * *. The only section which gives a private remedy is the seventh * * *" (p. 822).

Greer, Mills & Co. v. *Stoller*, 77 Fed. 1 (C. C. W. D., Mo.):

> "Section 7 gives to the *private* person 'injured in his business or property by any other person or corporation by reason of anything forbidden, or declared to be unlawful by this act,' a right to sue in a circuit court of the United States in the district in which the defendant resides or is found for threefold damages by him sustained. The statute, being highly penal in its character, must be strictly construed; and, having created a new offense, and imposed new liabilities, and having provided the modes of redress to the public and the private citizen, by established rules of construction, these remedies are exclusive of all others" (p. 3).

United States v. *Patterson*, 201 Fed. 697 (S. D., Ohio), rev'd on other grounds 222 Fed. 599 (C. C. A. 6th), cert. den. 238 U. S. 635:

> "The act does not primarily grant any right to be enforced in a civil action. It creates an offense, a crime, describing what the crime is. To do the

acts proscribed in the first and second sections is declared to be unlawful; that is to say, criminal. Hence the right given by Section 7 to an *individual* to recover for injury to his business or property with threefold damages, and the right given by section 4 to the *government* to prevent by injunction a continuance of the acts complained of, are rights growing out of the commission of a crime, by whomsoever it may be, whose acts also subject him to the criminal penalties of the statute. If he has been guilty of a crime described in sections 1 or 2, then he may be restrained by the *government* in a civil action, or be compelled by an *individual* who has been injured in his business or property to respond in threefold damages" (p. 714).

No change in the views of the lower courts has occurred.

Quemos Theatre Co., Inc. v. *Warner Bros. Pictures, Inc.*, C. C. H. Trade Reg. Serv. §25,599 (D. N. J.):

"* * * Section 7, the three-fold damage clause of the Sherman Act was designed to supply an ancillary force of *private* investigators to supplement the Department of Justice in law enforcement" (p. 26,702).

Glenn Coal Co. v. *Dickinson Fuel Co.*, 72 Fed. (2d) 885 (C. C. A. 4th):

"* * * It is well known that the main purpose of the Anti-Trust Act was to protect the public from monopolies and restraint of trade and the *individual* right of action was but incidental and subordinate" (p. 889).

This Court has reaffirmed this position of the lower courts.

Standard Sanitary Manufacturing Company v. *United States*, 226 U. S. 20 (cited by the plaintiff):

> "The Sherman Act provides for a criminal proceeding to punish violations and suits in equity to restrain such violations, and the suits may be brought simultaneously or successively. * * * Besides a suit by the *Government* there may be an action for damages by a '*person* injured by reason of anything forbidden by the Act'" (p. 52).

General Investment Co. v. *Lake Shore & Michigan So. Ry. Co.*, 260 U. S. 261:

> "As respects the Sherman Anti-Trust Act as it stood before it was supplemented by the Clayton Act, this Court has heretofore determined that the civil remedies specially provided in the act for actual and threatened violations of its provisions were intended to be exclusive and that those remedies consisted only of
>
> (a) suits for injunctions brought by the *United States* in the public interest under §4 and
>
> (b) *private* actions to recover damag brought under §7" (p. 286).

Tigner v. *Texas*, 310 U. S. 141:

> "The Sherman Law originally employed the injunction at the suit of the government, *private* action for triple damages, criminal prosecution and forfeiture. Later the injunction was made available to private suitors" (p. 148).

The courts in fact have expressly ruled that a sovereign government—such as the United States—is not a "person" within the meaning of the Sherman Act, and thus can neither be sued nor sue under Section 7.

In *Lowenstein* v. *Evans*, 69 Fed. 908 (C. C. D. S. C.), the State of South Carolina was sued as a "person" for treble damages under Section 7 of the Sherman Act. The Court held that a sovereign government such as a state—and thus, impliedly, a sovereign government such as the United States—was neither a "person" nor a "corporation" within the meaning of Section 7 and therefore could not be sued thereunder.

> "The section of the act of 1890, sued upon, gives a right of action for any injury by any other person or corporation. *The state is not a corporation.* A corporation is a creature of the sovereign power, deriving its life from its creator. The state is a sovereign having no derivative powers, exercising its sovereignty by divine right. * * * *Nor can it be said that the state is a person in the sense of this act*" (p. 911).

In *City of Atlanta* v. *Chattanooga Foundry*, 101 Fed. 900 (C. C. E. D. Tenn.), reversed on other grounds 127 Fed. 23 (C. C. A. 6th), affirmed 203 U. S. 390, cited by the plaintiff, the City of Atlanta was held entitled to sue as a "person" under Section 7 of the Sherman Act. This was because, conforming to the language of Section 8, the City was a "corporation existing under * * * [and] authorized by the laws of * * * [a] state"—which is clearly not the case with the United States. The Court expressly stated, however, in the portion of its opinion not reversed but rather referred to at 127 Fed. 29 as a "very full and able opinion", that the United States might not sue under Section 7:

> "The action provided for in section 7 of the act could *neither be brought in the name of the United States*, nor prosecuted as a popular or *qui tam* action, the remedy being expressly restricted to the

party 'injured in his business or property'" (101 Fed. 900, at 904).

The courts have repeatedly ruled that the Sherman Act in providing for treble damages was punitive in nature—although such damages were not a "penalty" in the technical sense of having no compensatory features. *Fleitmann* v. *Welsbach Street Lighting Company*, 240 U. S. 27, 29; *American Banana Co.* v. *United Fruit Co.*, 153 Fed. 943, 944 (C. C. S. D. N. Y.); *Decorative Stone Co.* v. *Building Trades Council of Westchester County*, 23 Fed. (2d) 426 (C. C. A. 2nd), cert. den. 277 U. S. 594; *Greer, Mills & Co.* v. *Stoller*, 77 Fed. 1, 3 (C. C. W. D. Mo.); *Johnson* v. *Joseph Schlitz Brewing Co.*, 33 F. Supp. 176, 182 (E. D. Tenn.). Consequently they have emphatically ruled that such a punitive statute, setting up a carefully defined remedial structure that allocates specified kinds of relief to specified parties, must be construed as written and not broadened by implication. *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 173-175; *Fleitmann* v. *Welsbach Street Lighting Co., supra; Hansen Packing Co.* v. *Armour & Co.*, 16 F. Supp. 784, 787 (S. D. N. Y.); *La Chappelle* v. *United Shoe Machinery Corp.*, 13 F. Supp. 939 (D. Mass.); *Seaboard Terminals Corp.* v. *Standard Oil Co.*, C. C. H. Trade Reg. Serv. §25,013, at p. 25,057 (S. D. N. Y.).

In short, the views of the courts during the past 50 years may be summarized along the lines of Judge Chase's ruling in the instant case:

> "* * * the Act has heretofore been construed uniformly to give the government power to prosecute criminally and to secure injunctions and to give *private* parties by Sec. 7 the right to recover civil damages for injuries" (114 F. (2d) 413, at 414).

(b) The Department of Justice.

The Department of Justice has similarly taken the position (until the commencement of this suit) that the right to sue for fines, imprisonment, injunctions and forfeitures belongs to the United States while the right to sue for treble damages belongs to private individuals and corporations.

Section 7 has been in existence for 50 years and during this time up to the present action not one suit has been instituted by the Department, as a plaintiff, to recover treble damages thereunder. The Department has instituted hundreds of criminal and injunctive actions against defendants who—in many cases—were also sellers of goods to the Government, but has never preceded or followed such actions by a single treble damage suit.

The Department in fact has expressly declared that the United States is not authorized to sue for treble damages under Section 7 of the Serman Act. As late as 1926 the Attorney General, in discussing why the United States had not brought suit under Section 7, explained to the Senate that

> "Under Section 7, which gives to *private* persons the right to sue for injuries arising under the act, a number of actions have been instituted. The United States, however, under the statute is *not a party to suits under that section*" (Sen. Doc. No. 79, 69th Cong. 1st Sess.).

The Commissioner of Corporations, predecessor to the Federal Trade Commission, made in 1915 a Report to the President on Trust Laws and Unfair Competition which similarly recognized that the United States might proceed solely under the criminal, equitable and condemnation sections of the Sherman Act—while private parties alone were entitled to sue for treble damages.

"Judicial proceedings under the Sherman Law may be divided into five broad classes: (1) Criminal prosecutions; (2) suits in equity by the Government; (3) condemnation proceedings by the Government with respect to goods transported in interstate commerce; (4) actions by *private* parties for treble damages; (5) actions at law or suits in equity between private parties where the law has been pleaded in defense, or where relief has been affirmatively sought from restraints imposed by agreements" (p. 120).

Cf. the Ruling of the Attorney General that the Robinson-Patman Act does not apply to the United States (1936) 38 *Op. Att. Gen.* 539. The ruling was made despite—and without reference to—the fact that the Act forbids a "person" either to induce or to receive a price discrimination. If the United States is a "person" under the anti-trust acts, and thus under the Robinson-Patman Act, the United States may be subject to treble damage suits for receiving favorable price differentials.

(c) Congress.

Since the interpretation of Section 7 of the Act accepted by both the courts and Government administrators of the anti-trust laws over a period of many years has been that the United States may not sue for treble damages, and since during that time the Act has been amended and supplemented in many particulars—without changing this accepted interpretation—recognition must be given to this interpretation as the established Congressional intent.

This is confirmed by the reenactment in almost identical words of Section 7 of the Sherman Act after 24 years in Section 4 of the Clayton Act, despite the express recognition by Congress in thus legislating that the Section did not permit the United States to sue for treble damages.

Senator Culberson,* Chairman of the Senate Judiciary Committee, reported out the Clayton Bill in the Senate. In explaining the Bill he specifically listed the common types of action brought under the Sherman Act, *i. e.*, criminal prosecution, suit in equity and action for damages, and flatly stated with respect to Government suits under the Sherman Act and the new Bill that:

> "There is no suit authorized by any of these statutes except a criminal prosecution or a suit in equity. *The United States does not bring a suit at law for damages*" (51 Cong. Rec. 13898).**

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* Senator Culberson was not the type of legislator apt to give "unconsidered opinions" as suggested by the Government. The Senator, in addition to being an exceptionally able lawyer, was twice Attorney General of Texas, twice Governor of that State, and for 24 years Senator in the United States Senate.

** Despite the misleading statements in the Government's brief concerning their views, at pp. 38-39 and 70-78, the House sponsors of the Act were in complete accord with Senator Culberson—as shown by the following:

Representative Floyd, member of the Judiciary Committee in charge of the original debate on the Clayton Bill for the majority, referred to the treble damage section as follows:

> "We propose, in the first place, in one of the sections of this bill, to give every *private* suitor who has a cause of action against a combination acting in violation of law triple damages under this bill, as he is given triple damages under section 7 of the Sherman Act against the offending corporation" (51 Cong. Rec. 9490).

Representative Volstead, member of the Judiciary Committee in charge of the original debate on the Clayton Bill for the minority, referred to the same section as follows:

> "* * * I think that section may add quite a little to the remedy which *private* parties have in securing relief where they have been oppressed by unfair methods of competition" (51 Cong. Rec. 9079).

Representative Webb, Chairman of the Judiciary Committee, in charge of the final debate on the Clayton Bill, listed the following five civil remedies as available under the Bill: (1) treble damage actions by persons, (2) suspension of the statute of limitations during Government suits, (3) suits by the Federal Trade Commission, (4) injunctive suits by the United States, and (5) injunctive suits by persons (51 Cong. Rec. 16275). He then stated

The Clayton Act, it might be noted, by Section 16 gives to any "person" or "corporation" (not merely a corporation "existing under" or "authorized by" the "laws of the United States") the right to sue for injunctive relief. That Congress most emphatically felt that this Section 16 does not give to the United States as any "person" the right to sue for injunctive relief is shown by the provision of an entirely separate and independent Section—15—giving in express words to the United States the right to injunctive relief.

As has been pointed out by the plaintiff, at the end of Section 16 Congress added the proviso that "nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States," to proceed in equity against common carriers. In other words, despite Section 16, no "person" was to sue in equity against common carriers—the United States under Section 15 alone having this right.

The courts have repeatedly stated in accordance with Congressional intent that Section 16, while using the word any "person" or "corporation", is restricted to giving private parties injunctive relief.

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that these remedies were cumulative and open to the individual and Government (51 Cong. Rec. 16276). By this last statement he could not have meant that all five remedies were open to the individual and likewise all five open to the Government—as argued in the Government's brief—because, for example, the Federal Trade Commission proceedings were not open to the individual. The Representative merely meant that the remedies were open to the individual and the Government in the manner designated in the Bill. The Representative had previously indicated that private individuals only were to sue for treble damages. Thus he had stated with respect to the treble damage section of the Bill that:

> "they * * * give the *individual* the right to sue for treble damages
>
> * * * * * *
>
> we are liberalizing the procedure in the courts in order to give the *individual* who is damaged the right to get his damages anywhere * * *" (51 Cong. Rec. 16274).

Thus in *Central Transfer Co.* v. *Terminal Railroad Ass'n*, 288 U. S. 469, this Court ruled that:

> "* * * §16 of the Clayton Act * * * affects only the capacity of a *private* party to maintain a suit to restrain violations" (pp. 474-5).

Again, in *Duplex Printing Press* v. *Deering*, 254 U. S. 443:

> "The Clayton Act * * * in §16 (38 Stat. 737), gives to *private* parties a right to relief by injunction in any court of the United States against threatened loss or damage by a violation of the anti-trust laws, under the conditions and principles regulating the granting of such relief by courts of equity. Evidently this provision was intended to supplement the Sherman Act, under which some of the federal courts had held, as this court afterwards held in *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 471, that a *private* party could not maintain a suit for injunction" (pp. 464-5).

If an administrative or judicial interpretation has been placed upon any provision or provisions of an Act such as Section 7 of the Sherman Act, and if subsequently Congress partially or substantially reenacts the statute leaving untouched the provision which has been so interpreted, the presumption arises that this interpretation was that intended by Congress. See *Komada & Co.* v. *United States*, 215 U. S. 392, 396; *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320, 336. In *Brewster* v. *Gage*, 280 U. S. 327, this Court said:

> "It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty

reason. * * * The substantial reenactment in later Acts of the provision theretofore construed by the department is persuasive evidence of legislative approval of the regulation. *National Lead Co.* v. *United States*, 252 U. S. 140, 146. *United States* v. *Cerecedo Hermanos y Compania*, 209 U. S. 337, 339. *United States* v. *G. Falk & Brother*, 204 U. S. 143, 152" (pp. 336-37).

Also note *United States* v. *Republic Steel Corp.*, 11 F. Supp. 117, 123-4 (N. D. Ohio) (as to recognition of administrative rulings under the anti-trust laws); and *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 524-5 (as to recognition of administrative practice under the Banking Act—a case cited by the plaintiff).

(d) O'Mahoney Bill.

Congress has recently been considering S. 2719—a Bill prepared jointly by Senator O'Mahoney, Chairman of the Temporary National Economic Committee, and United States Assistant Attorney General Thurman Arnold.

This Bill, according to Senator O'Mahoney's statement of June 28, 1939, is intended to provide the United States with additional rights of suit under the Sherman Act such as a right to collect civil penalties, and thereby to supplement the present rights of suit of the United States under the Act. In listing the present rights of suit of the United States the Senator carefully pointed out that the private person, and not the Department of Justice, was entitled to sue for treble damages.

"The purpose of the bill which I have introduced today, after conferences with Assistant Attorney General Thurman Arnold, is to make the Anti-Trust Laws more effective by providing civil remedies which are calculated to deter corporate executives

from undertaking policies and practices which they have good reason to know are in restraint of trade and prohibited by law.

"One of the principal reasons why the Anti-Trust Laws have not heretofore prevented combinations and mergers hostile to the public interest is that the penalties and remedies for violations as now provided are altogether inadequate. Jail sentences are seldom imposed, because the public does not place an economic offense in the same category with an ordinary criminal offense involving moral turpitude. On the other hand, a $5,000 fine is of no concern to the large corporation.

"There is only one other remedy worth mentioning available under existing law to the Department of Justice—the civil action for an injunction. *In addition, there is the action in damages by a private person who has been injured.* Neither of these remedies is effective.

"The new bill is designed to bring violations of the law home to officers and directors of corporations who are personally responsible for the economic offenses of the corporations they represent. The bill permits the United States, in effect, to bring a suit for damages against an offending corporation and against its individual directors and officers. It also permits the United States to bring suit to terminate the corporate employment of any officer or director who is responsible for a violation of the Anti-Trust Laws."

The introduction into Congress of S. 2719 points to the appropriate procedure for dealing with the question of suit by the United States for damages.

Should this Court deal with the question, as the Government submits, the Court must not only give a most distorted and unwarranted construction to the Sherman Act but must recognize in the United States a right to three-

fold or punitive—as distinguished from actual or remedial —damages. The United States would thereby not merely be made whole; it would be given a new punishment to add to fines, imprisonment, injunctions and forfeitures.

Should Congress deal with the question, as defendants-respondents submit, Congress rather than the courts would be legislating upon the matter and would be able to weigh the relative merits of granting to the United States treble, double or remedial damages.

Conclusion.

The defendants-respondents most respectfully submit that—legal argument failing, as above demonstrated—the Government has relied in this case almost solely upon the claim that the remedies of the United States as provided in the Sherman Act are ill adapted to Government needs. The Government has principally argued that the United States is not adequately protected by its rights to fines, imprisonment, injunction and forfeitures—so therefore it must be given a new right.

The defendants-respondents have pointed out that this argument is completely irrelevant to a consideration of the legal issue here involved, as well as exceedingly questionable in fact.

By reason of the stress laid by the Government on this claim, however, the defendants-respondents desire in closing to refer to a most apt observation of this Court in the recent case of *Tigner* v. *Texas,* 310 U. S. 141. Speaking through Mr. Justice Frankfurter this Court firmly ruled with respect to an anti-trust statute that:

> "How to effectuate policy—the adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems. Whether

proscribed conduct is to be deterred by *qui tam* action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice. Judgment on the deterrent effect of the various weapons in the armory of law can lay little claim to scientific basis. Such judgment as yet is largely a prophecy based on meager and uninterpreted evidence. * * *

"Legislation concerning economic combinations presents peculiar difficulties in the fashioning of remedies. * * * They are thus matters within legislative competence" (pp. 148-9).

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 484.—October Term, 1940.

The United States of America, Petitioner, *vs.* The Cooper Corporation, et al.	On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 31, 1941.]

Mr. Justice Roberts delivered the opinion of the Court.

We took this case because it presents the important question whether the United States may maintain an action for treble damages under § 7 of the Sherman Act.[1]

The complaint charged the respondents had illegally combined and conspired to fix collusive prices of articles purchased by the United States; alleged the money damage inflicted upon the United States thereby, and sought judgment for three times that amount. The District Court granted a motion to dismiss the complaint on the ground that the United States is not a person as the term is used in § 7 of the Sherman Act.[2] The Circuit Court of Appeals affirmed the judgment.[3]

Section 7 provides:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The United States is a juristic person in the sense that it has capacity to sue upon contracts made with it or in vindication of its property rights. The Sherman Act, however, created new rights and remedies which are available only to those on whom they are conferred by the Act.[4] The precise question for decision,

[1] Act of July 2, 1890, c. 647, 26 Stat. 209, 210.

[2] 31 F. Supp. 848.

[3] 114 F. (2d) 413.

[4] Wilder Mfg. Co. *v.* Corn Products Refining Co., 236 U. S. 165, 174; Fleitmann *v.* Welsbach Street Lighting Co., 240 U. S. 27, 29; Geddes *v.* Anaconda Copper Mining Co., 254 U. S. 590, 593.

therefore, is whether, by the use of the phrase "any person", Congress intended to confer upon the United States the right to maintain an action for treble damages against a violator of the Act.

Since, in common usage, the term "person" does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it.[5] But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law.[6]

The Government admits that often the word "person" is used in such a sense as not to include the sovereign but urges that where, as in the present instance, its wider application is consistent with, and tends to effectuate, the public policy evidenced by the statute, the term should be held to embrace the Government. And it strongly urges that all the considerations which moved Congress to confer the right to recover damages upon individuals and corporations injured by violations of the Act apply with equal force to the United States which, as a large procurer of goods and services, is as likely to be injured by the denounced combinations and monopolies as is a natural or corporate person. We are asked, in this view, so to construe the Act as not to deny to the Government what public policy is thought to require.

Decision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of construction. On the contrary, we are to read the statutory language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction. But it is not our function to engraft on a statute additions which we think the legislature logically might or should have made.[7]

The recent expressions of this court in *Tigner* v. *Texas,* 310 U. S. 141, 148, 149, warn that it is not for the courts to indulge in the

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[5] United States *v.* Fox, 52 N. Y. 530; *Id.*, 94 U. S. 315, 321.

[6] See Levy *v.* McCartee, 6 Pet. 102, 110; United States *v.* Freeman, 3 How. 556, 565; Ohio *v.* Helvering, 292 U. S. 360, 370; Nardone *v.* United States, 302 U. S. 379.

[7] The Pedro, 175 U. S. 354, 364; Dewey *v.* United States, 178 U. S. 510, 519, 520; Pirie *v.* Chicago T. & T. Co., 182 U. S. 438, 451; White *v.* United States, 191 U. S. 545, 551, 552; Ebert *v.* Poston, 266 U. S. 548, 554; Helvering *v.* Oregon L. I. Co., 311 U. S. 267, 272.

business of policy making in the field of antitrust legislation. Congress has not left us at large to devise every feasible means for protecting the Government as a purchaser. It is the function of Congress to fashion means to that end, and Congress has discharged this duty from time to time according to its own wisdom. Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress.

1. Without going beyond the words of the section, the use of the phrase "any person" is insufficient to authorize an action by the Government. This conclusion is supported by the fact that if the purpose was to include the United States, "the ordinary dignities of speech would have led" to its mention by name.[8] It is supported also by the collocation of the phrase in the section. The provision is that "any person" injured by violation of the Act "by any other person or corporation" may maintain an action for treble damages against the latter. It is hardly credible that Congress used the term "person" in different senses in the same sentence. Yet, unless it did, the United States would not only be entitled to sue but would be liable to suit for treble damages. The more natural inference, we think, is that the meaning of the word was in both uses limited to what are usually known as natural and artificial persons, that is, individuals and corporations. In addition, the concluding words of the section give the injured party, as part of his costs, a reasonable attorney's fee,—a provision more appropriate for a private litigant than for the United States.

2. The connotation of a term in one portion of an Act may often be clarified by reference to its use in others. The word "person" is used in several sections other than § 7. In §§ 1, 2, and 3 the phrase designating those liable criminally is "every person who shall" etc. In each instance it is obvious that while the term "person" may well include a corporation it cannot embrace the United States. In § 8 Congress attempted to make clear that the term "person" is to include a corporation. The provision is "that the word 'person', or 'persons', wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any

[8] Davis *v.* Pringle, 268 U. S. 315, 318.

foreign country." The very fact, however, that this sweeping inclusion of various entities was thought important to preclude any narrow interpretation emphasizes the fact that if the United States was intended to be included Congress would have so provided expressly. We may say in passing that the argument that the United States may be treated as a corporation organized under its own laws, that is, under the Constitution as the fundamental law, seems so strained as not to merit serious consideration. It is fair to assume that the term "person", in the absence of an indication to the contrary, was employed by the Congress throughout the Act in the same, and not in different, senses.

3. The scheme and structure of the legislation is likewise important to a proper ascertainment of its purpose and intent. Sections 1, 2, and 3 impose criminal sanctions for violations of the acts denounced in those sections respectively. Section 4 gives jurisdiction to the federal courts of proceedings by the Government to restrain violations of the Act and imposes upon United States Attorneys the duty to institute equity proceedings to that end. Section 5 regulates service in such suits. Section 6 authorizes seizure, in the course of interstate transportation, of goods owned under any contract or pursuant to any conspiracy made illegal by the statute.

Thus far the Act deals in detail with the criminal and civil remedies of the Government in vindication of the policy of the legislation. There follows § 7, the only other substantive section, giving a civil action for an injury to property rights.

It seems evident that the Act envisaged two classes of actions,—those made available only to the Government, which are first provided in detail, and, in addition, a right of action for treble damages granted to redress private injury. If this be the fair construction of the Act, the Court's task is finished when it gives effect to the purposes of the law, evidenced by the various remedies it affords for different situations. Though the law gave a remedy by way of injunction at the suit of the United States, we were pressed to say that a private person should have the same remedy. We were compelled to answer that Congress had not seen fit so to provide.[9] For the like reasons we cannot hold that since a private

[9] Minnesota *v.* Northern Securities Co., 194 U. S. 48, 71; Paine Lumber Co. *v.* Neal, 244 U. S. 459. The Act was amended to authorize suits for injunctions by private litigants. See the Clayton Act of October 15, 1914, c. 323, § 16, 38 Stat. 730, 737; 15 U. S. C. § 26.

purchaser is given a remedy for his losses in treble damages, the United States should be awarded the same remedy.

4. Supplemental legislation lends support to the view that Congress had in mind the distinction between public and private remedies and did not intend to confer a right of action on the United States by the use of the phrase "any person" in § 7. The antitrust provisions of the Wilson Tariff Act[10] follow the same pattern as the Sherman Act. Section 73[11] denounces combinations and agreements between parties importing articles from a foreign country and declares that every person guilty of violation of its terms shall be punished. Section 74 confers jurisdiction upon the federal courts and authorizes proceedings in equity by the United States to restrain such acts. Section 76 provides for seizure and forfeiture of property imported into the United States contrary to law and § 77 gives an action for treble damages to any person against any other person or corporation in the exact words of § 7 of the Sherman Act.

The antidumping provisions of the Revenue Act of 1916[12] make it a criminal offense for "any person" importing articles from a foreign country to sell, or cause to be imported or sold, such articles within the United States at substantially less than the market value of such articles at the time of exportation in the principal markets of the country of production, etc. They further declare that any person injured in his business or property by any violation may sue therefor in the United States courts and recover threefold damages and costs, including a reasonable attorney's fee. It must be obvious that the United States cannot be embraced by the phrase "any person" there used.

When Congress came to supplement the Sherman Act by the Clayton Act,[13] it included in the latter a significant section bearing upon the question under consideration. Doubts had arisen as to whether issues adjudicated in a criminal proceeding or a suit in equity brought by the United States should be taken as concluded in an action for treble damages subsequently brought by an injured

[10] Act of August 27, 1894, c. 349, 28 Stat. 509, as amended by Act of Feb. 12, 1913, c. 40, 37 Stat. 667; 15 U. S. C. § 8.

[11] 28 Stat. 570, 37 Stat. 667.

[12] Act of September 8, 1916, c. 463, 39 Stat. 756, 798, 15 U. S. C. § 72.

[13] Act of October 15, 1914, c. 323, 38 Stat. 730.

party. By § 5 of the Clayton Act it was sought to give such adjudication that effect. The section provides:

"A final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken."

Immediately following this provision the section continues:

"Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

Here again it seems clear that Congress recognized the distinction between proceedings initiated by the Government to vindicate public rights and actions by private litigants for damages.

It should be noted that § 1 of the Clayton Act again defined the term "person" exactly as it was defined by § 8 of the Sherman Act, and § 4 again enacted that any person injured by a violation might recover treble damages together with a reasonable attorney's fee.

5. There has been a considerable body of judicial expression to the effect that § 7 authorizes an action for damages only by private suitors and not by the Government.[14] While none of the cases presented the exact question here involved, the statements bearing on the subject exhibit a uniform opinion contrary to the Government's present contention.

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[14] Pidcock *v.* Harrington, 64 Fed. 821, 822; Lowenstein *v.* Evans, 69 Fed. 908, 911; Greer, Mills & Co. *v.* Stoller, 77 Fed. 1, 3; City of Atlanta *v.* Chattanooga Foundry, 101 Fed. 900, 904; Standard Sanitary Manufacturing Co. *v.* United States, 226 U. S. 20, 52; United States *v.* Patterson, 201 Fed. 697, 714; General Investment Co. *v.* Lake Shore & Michigan So. Ry. Co., 260 U. S. 261, 286; Glenn Coal Co. *v.* Dickinson Fuel Co., 72 F. (2d) 885, 889; Quemos Theatre Co. *v.* Warner Bros. Pictures, 35 F. Supp. 949, 950; Tigner *v.* Texas, 310 U. S. 141, 148.

6. The legislative history is persuasive that the Sherman Act was not intended to give the United States a civil action for damages. Senator Sherman, on March 18, 1890, introduced a bill which, in § 1, provided that the United States might bring various civil actions and, in § 2, that "any person" should be entitled to sue any "person" or "corporation" for double damages.[15]

In the discussion of the bill it was pointed out that § 1 authorized the United States to bring civil actions including those for simple damages and that, under § 2, private parties were entitled to sue for double damages. Senator Sherman stated that § 2 gave a right to sue for double damages only to private parties and not to the United States. He stated that the civil suit by the United States authorized by § 1 might be for an ouster of the power of the corporation, for damages, or in *quo warranto,* and added: "But the second section provides purely a personal remedy, a civil suit also by citizens of the United States."[16]

As is well known, after Senator Sherman's bill had been amended, Senator Hoar rewrote most of the bill. In so doing he eliminated § 1 with its provision for civil suits by the United States and substituted §§ 1, 2, 3, 4, and 6, specifying the remedies, civil, criminal, and by way of forfeiture, available to the United States. In that revision he retained, with slight change, § 2 of the bill, increasing the recoverable damages to treble instead of double, and renumbered the section as § 7. In this form the bill was adopted.

As already stated, the language of § 7 of the Sherman Act was repeated in later statutes extending the antitrust laws although in the meantime this and other courts had expressed the view that

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[15] "Section 1:

" . . . And the circuit court of the United States shall have original jurisdiction of all suits of a civil nature at common law or in equity arising under this section, and to issue all remedial process, orders, or writs proper and necessary to enforce its provisions. And the Attorney-General and the several district attorneys are hereby directed, in the name of the United States, to commence and prosecute all such cases to final judgment and execution."

"Section 2:

"That any person or corporation injured or damnified by such arrangement, contract, agreement, trust, or combination defined in the first section of this Act may sue for and recover, in any court of the United States of competent jurisdiction, without respect to the amount involved, of any person or corporation a party to a combination described in the first section of this Act, twice the amount of damages sustained and the costs of the suit, together with a reasonable attorney's fee."

[16] 21 Cong. Rec. 2563-2564.

the section accorded the Government no right of suit for treble damages. When the Clayton Act was before the Senate, Senator Culberson, Chairman of the Committee which reported the bill, enumerated the usual types of action prosecuted under the Sherman Act,—criminal prosecutions, suits in equity, and actions for damages, and stated with respect to Government suits under the Sherman Act and the Clayton Act: "There is no suit authorized by any of these statutes except a criminal prosecution or a suit in equity. The United States does not bring a suit at law for damages."[17]

In 1926 the Attorney General, in response to a Senate Resolution asking for information with respect to cases instituted under the first seven sections of the Sherman Act, wrote: "Under Section 7, which gives to private persons the right to sue for injuries arising under the act, a number of actions have been instituted. The United States, however, under the statute is not a party to suits under that section."[18]

Senator O'Mahoney has introduced a bill, which is pending as S. 2719, prepared jointly by him and by the Assistant Attorney General in charge of antitrust matters. On June 28, 1939, the Senator stated that the purpose of the bill was to provide more effective civil remedies. In the course of his statement he said: "There is only one other remedy worth mentioning available under existing law to the Department of Justice—the civil action for an injunction. In addition, there is the action in damages by a private person who has been injured. Neither of these remedies is effective." He further stated: "The bill permits the United States, in effect to bring a suit for damages against an offending corporation and against its individual directors and officers."[19]

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17 51 Cong. Rec. 13898. Statements by members of the House Judiciary Committee indicate a similar view: 51 Cong. Rec. 9079, 9490. Representative Webb the chairman of that Committee mentioned the civil remedies available under the bill as treble damage actions by persons, suits by the Federal Trade Commission, suits by the United States for injunctions, and similar suits by persons. He then said "Certainly the remedies are cumulative. The remedies pile up, and all of the remedies are open to the individual in a suit." 51 Cong. Rec. 1627. But obviously he meant that the remedies given the public and the individual *respectively* were cumulative, as they clearly are; for it is plain the remedy given the Federal Trade Commission is not afforded to the individual.

18 Sen. Doc. No. 79, 69th Cong., 1st Sess., p. 1.

19 84 Cong. Rec. 8192.

and to the Government

7. It is significant that, in the light of the expressions by the courts, the supplemental legislation, and the legislative history, no action has ever been brought by the United States under § 7 in the fifty years during which the statute has been in force until the present action was instituted. Down to the close of the year 1937, 428 criminal prosecutions and suits in equity had been instituted by the Government.[20] Down to December, 1939, 103 civil suits had been instituted by private persons, including corporations.[21] In the meantime the World War intervened with the Government a purchaser of enormous quantities of material and supplies. Then, as now, the complaint was prevalent that agreements and conspiracies existed to fix and maintain prices of materials needed by the Government. And throughout the life of the legislation able and vigilant officials devoted to enforcement of the policy of the Sherman Act have not been wanting.

In these circumstances the conviction that no right to sue had been given the Government, rather than a supine neglect to resort to an available remedy seems to us the true explanation of the fact that no such actions have been instituted by the United States.

In summary, we are of opinion that the text of the Act, taken in its natural and ordinary sense, makes against the extension of the term "person" to include the United States and that the usual aids to construction, taken together, instead of inducing the contrary conclusion, go to support the view that Congress did not use the word in the sense for which the Government contends.

The judgment is affirmed.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

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20 "Federal Antitrust Laws", published by the Department of Justice January 1938.

21 49 Yale Law Journal 296.

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SUPREME COURT OF THE UNITED STATES.

No. 484.—October Term, 1940.

United States of America, Petitioner, *vs.* The Cooper Corporation, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 31, 1941.]

Mr. Justice Black, dissenting.

In order to give purchasers of goods an opportunity to buy them at prices fixed by competitive trade, the Sherman Act made it illegal to fix prices by combination or conspiracy. It is difficult for me to believe that Congress did not intend to give equal protection to all purchasers similarly injured. In my judgment, no language of that Act, nothing in its history, and no argument now presented for our consideration makes necessary the conclusion that Congress intended to discriminate in favor of some purchasers and against others. It would require clear and unequivocal statutory language to persuade me that Congress intended to grant a remedy to all except one of those who were injured by trust prices—the "all" including every natural and artificial person, every corporation and association,[1] foreign and domestic, and the single exception being the United States, which buys more goods and services than any other single purchaser.[2] No such clear and unequivocal statutory language exists.

[1] A 1940 report to the Senate, made by the Secretary of the Treasury pursuant to a Senate Resolution, revealed that the federal government was transacting part of its business through the medium of at least 1469 government corporations. Senate Document No. 172, 76th Cong., 3rd Sess., Part 1, p. 4. The judgment here does not foreclose such corporations from suing for damages under section 7, or so I assume. If I am correct in my assumption, the result is that as to those purchases made by its corporate agencies, the Government is protected by the Sherman Act, while as to those purchases made by its non-corporate agencies, it is not so protected. A process of statutory construction which results in giving to government corporations a right denied to constitutionally authorized government departments seems to me to conflict with the frequently declared rule that a statute should not be interpreted in such way as to produce an unreasonable or unjust result. See United States *v.* American Trucking Associations, 310 U. S. 534, 542-543; Sorrells *v.* United States, 287 U. S. 435, 446.

[2] For a recent study, see "Government Purchasing — An Economic Commentary", Monograph No. 19 of the Temporary National Economic Committee (1940).

And no plausible reason has been hazarded to prove that the government as a purchaser of goods needs less protection from unlawful combinations than do other buyers.[3] Many deplorable instances in our history, in fact, indicate the contrary. Congress, no doubt stimulated to action by these historical occurrences, has by numerous enactments recognized the urgent necessity for safeguarding governmental purchases of goods and services against unfair and collusive price-fixing. To that end, competitive bidding as a prerequisite to government contracts has been the general statutory rule over a long period of years, and combinations to deprive the government of the advantages of such competition have been made criminal. It is therefore strange indeed that the Sherman Act, the greatest of all legislative efforts to make competition, not combination, the law of trade, should now be found to afford a greater protection against collusive price-fixing to every other buyer in the United States than is afforded to the United States itself.

So much for what seems to me to be the logical approach to the problem, and the one that should cause us to say that the government can sue for damages. If, however, we apply familiar canons of construction, I think we are led to the same result. For it is a primary principle that a law should be construed so as to carry out its purpose, in the light of the evil aimed at and the protection intended to be afforded. Here, among the evils legislated against was price-fixing by combination, and among the remedies afforded was the giving of a right of action to purchasers injured by prices so fixed. The result of this case—denying to the largest single purchaser of all goods manufactured and sold in the nation the protection afforded by this legislation—is to restrict the remedy in such way that the evil aimed at is less likely to be suppressed. For the construction given the Sherman Act, insofar as sales to the government and civil damages are concerned, enables those guilty of violating it to elude its provisions, escape its consequences, and defeat its objects.

Nor do I believe that the previous failure of the Attorneys General of the United States to bring actions similar to this should be

[3] An argument is offered to the effect that the government has no need of a right to damages, because it has the power to bring criminal and injunctive proceedings. But the right to bring those proceedings is given to the government for the protection of the public, rather than for its self protection as a purchaser. Further, criminal and injunctive proceedings, whatever their efficacy, do not achieve the object of section 7, which is to indemnify all injured purchasers.

deemed a persuasive reason to read the government out of the Act's benefits. The 1926 statement of the Attorney General to the effect that "the United States . . . is not a party to suits under" section 7 does not supply such a reason. For in the quoted statement the Attorney General did not take the position that the government lacked the power to sue for civil damages; apparently what he had reference to was the fact that the Sherman Act did not make the United States a party to actions for civil damages by private persons against private persons. We do not know and cannot possibly determine why no prior suits were instituted for the benefit of the government. To assign reasons for such inaction is but to guess. And the guesses would doubtless vary almost in accordance with the preconceived notions of the guessers. But whatever might have been the reasons behind the government's failure to sue, sure it is that the Attorney General is not the purchasing agent of the government. He cannot be assumed to have constant knowledge of the manifold problems that face those who buy the government's supplies. In the final analysis, it is probably true that even an Attorney General who might zealously desire to enforce the criminal provisions of the Sherman Act would not likely be stimulated to institute civil proceedings for damages unless his attention was directed to the point by keenly alert and diligent purchasing agencies. To attempt to construe the Sherman Act by a vain effort to appraise the reasons responsible for the non-action of Attorneys General is a journey into the realm of imponderables I find it unnecessary to take. I would simply read the Act from its language and manifest purpose as giving all purchasers of goods a right to sue if they have been injured as the result of prices held up by those types of unlawful combination condemned by the Act.[4]

[4] Though the Act is all-inclusive in naming those who may sue for damages, it is not equally all-inclusive in describing those acts which may be regarded as unlawful combinations. This is true both because of the original language and objects of the Sherman Act itself, and because of subsequent legislation. The most notable example of such subsequent legisation is that portion of the Clayton Act which provides: "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 38 Stat. 731, 15 U. S. C. § 17. See Apex Hosiery Co. *v.* Leader, 310 U. S. 469.

The principle of strict construction now adopted in this case, resulting as it does in denying to the government the benefit of section 7 of the Sherman Act, is a radical departure from a long established policy under which the courts have construed laws most liberally in order to declare the government entitled to their benefits.[5] And certainly it can hardly be denied that the language of the Act, giving all persons a right of action, should if liberally construed be held to justify suit by the United States. For in *Cotton* v. *United States*, 11 How. 229, 231, decided forty years before the Sherman Act was adopted, this Court said in speaking of the United States: "Every sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property . . . . . It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection." And, speaking in similar vein in *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 92, after having cited Blackstone for the proposition that the sovereign is a "corporation", and after having gone even beyond this to hold that the statutory word "resident" included the United States, the Court said: "This may be in the nature of a legal fiction; but legal fictions have an appropriate place in the administration of the law when they are required by the demands of convenience and justice."[6]

These particular cases are but facets of a general rule that has long been accepted—the United States can exercise all of the legal remedies which other persons, bodies or associations can exercise,

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[5] It is argued that if the government can sue for damages it may also be sued for damages. That question is not before us and need not be decided. Other principles will be material if such a question ever should be presented. See United States *v.* Sherwood, this day decided; Nardone *v.* United States, 302 U. S. 379, 383-384; United States *v.* Knight, 14 Pet. 301, 315. Among these principles the most important is that of sovereign immunity. "The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; nor should a court enlarge its liability to suit beyond what the language [of the statute in question] requires." Eastern Transportation Co. *v.* United States, 272 U. S. 675, 686; Price *v.* United States, 174 U. S. 373, 375-376; United States *v.* Sherwood, *supra*.

[6] To this statement the Court added: "If to carry out the purposes of a statute it be admissible to construe the word 'person' as including the United States [cases to that effect having previously been cited], it is hard to see why, in like circumstances, it is inadmissible to construe the word 'resident' as likewise including the United States." Cf. Ohio *v.* Helvering, 292 U. S. 360, 370-71; Stanley *v.* Schwalby, 147 U. S. 508, 517.

both at common law and under statutes,[7] unless there is something in a statute or in its history to indicate an intent to deprive the United States of that right.[8] In this case, nothing in the Sherman Act itself and nothing in its legislative history makes necessary the conclusion that Congress intended to withhold from the United States a remedy given to all other purchasers.[9] Under these circumstances, it is my opinion that the judgment below should be reversed.

Mr. Justice REED and Mr. Justice DOUGLAS join in this dissent.

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[7] See Dugan *v.* United States, 3 Wheat. 172; United States *v.* Gear, 3 How. 120; Cotton *v.* United States, *supra.* Cf. Dollar Savings Bank *v.* United States, 19 Wall. 227; United States *v.* Chamberlin, 219 U. S. 250.

[8] Cf. Davis *v.* Pringle, 268 U. S. 315.

[9] The legislative history of the Sherman Act is not enlightening on the question now before us. At best, all that can be said of the very few and scattered statements that were made on the subject during the debates on the Clayton Act is that they look both ways.